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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

CITY OF LOS ANGELES, MICHAEL SIRK,

Petitioners,

vs.

HENRY BRADFORD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the existence of alternatives to the use of deadly force render a police officer's use of deadly force constitutionally unreasonable as unnecessary to prevent escape under this Court's holding in ***Tennessee v. Garner,*** 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)?

2. If a police officer has probable cause to believe a criminal suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, and that the suspect may harm others if allowed to escape, is it constitutionally permissible for the officer, after issuing a warning, to use deadly force to apprehend the suspect even if other alternatives to the use of deadly force are available to apprehend the suspect?

3. If the existence of non-deadly alternatives to apprehend a suspect render a police officer's use of deadly force unreasonable, must plaintiff prove that the alternatives relied upon are ones a reasonable police officer would have relied upon in the same circumstances or may merely speculative or theoretical alternatives to the use of deadly force render the use of such force unconstitutional?

PARTIES IN THE ACTION

Henry Bradford was plaintiff and appellee in the court below.

Los Angeles Police Detective Michael Sirk and the City of Los Angeles were defendants and appellants in the court below.

Police Chief Daryl Gates was a defendant in the trial court action but was dismissed prior to the filing of the appeal and is not a party to this petition.

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The Petitioners, City of Los Angeles and Michael Sirk, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on April 4, 1994.

OPINION BELOW

The Memorandum opinion in this case, filed April 4, 1994, was deemed not appropriate for publication. The Memorandum is attached hereto in the Appendix.

JURISDICTION

Petitioners were appellants in this case in the United States Court of Appeals for the Ninth Circuit. The opinion and judgment was entered on April 4, 1994. A timely Petition for Rehearing and suggestion for rehearing en banc was filed in the Court of Appeals on April 18, 1994. The Petition for Rehearing was denied by Order of the court entered May 17, 1994. Petitioners applied for and on June 9, 1994 obtained an Order granting their motion to stay the issuance of the mandate pending the filing of this petition for writ of certiorari.

This petition is timely filed within 90 days of the date the order denying rehearing was entered. ***28 U.S.C. §2101(c), Rule 13-4, Rules of the U.S. Supreme Court***. The jurisdiction of this Court is invoked pursuant to ***28 U.S.C. §1254.***

STATUTES INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Henry Bradford, respondent herein, filed a complaint for violation of his civil rights on January 14, 1990, alleging that the actions of the petitioners under color of state law deprived him of rights secured by the United States Constitution and were actionable pursuant to ***42 U.S.C. §1983***. Jurisdiction of the district court was invoked pursuant to ***28 U.S.C. §§1331 and 1343.***

Jury trial commenced on January 23, 1991, and the trial was bifurcated to first try the issue of whether petitioners violated respondent's constitutional rights. Respondent admitted in opening statement that he had been convicted of being an accessory after the fact to a kidnapping and asserted that the right to arrest him was not at issue. The only issue in the case was the officer's use of deadly force, in the form of a police vehicle, to stop respondent's flight.

On March 14, 1989, Detective Michael Sirk, petitioner herein, was involved in an investigation of a kidnapping of a woman and a young child. The suspects had demanded a ransom of money and drugs and a tape recording of the demands demonstrated that the kidnappers were capable of some violence and that lives were at risk.

The officers developed a tactical plan to meet the kidnappers' ransom demands. The victims' brother was to make the drop, throwing "money" and "cocaine" over the edge of a freeway embankment. The police provided the ransom in the form of a box and a suitcase filled with paper money and bogus cocaine. The pick-up would be made at night.

Sirk was assigned to the Special Investigations Section for the operation. He took up surveillance in a parked vehicle near the drop site. A car came into the area apparently looking for packages but was not stopped nor the occupants arrested because no one from that car picked up the ransom. Based on the activities of the car and its occupants, an air unit which had been assigned to the surveillance left with this car, as did several of the units assigned to hold the perimeter.

Another detective on foot observed a car pull up, and then a man get out and pick up the cardboard box and run back towards the vehicle. The detective came out onto the street, identified himself as a police officer and ordered the running man to stop. The man looked at him, threw the box at the vehicle while running and continued to run down the street.

Detective Sirk heard a radio broadcast that someone had retrieved the package and started his

vehicle moving. He was approximately 40-50 feet away when he first saw Bradford running down the street. Sirk drove up behind Bradford while the other officer in Sirk's car leaned out the window, pointing his service revolver, yelling at Bradford to stop for police. The officer testified that he did not attempt to stop Bradford by firing his service revolver because the background was wrong; that is, a residential neighborhood with too many inappropriate "targets" and opportunities for third-party injury.

Sirk believed he was pursuing a kidnap suspect who was escaping from the scene and that he had to stop this escape in order to protect the lives of the kidnap victims. He drove his vehicle up behind Bradford, hit the brakes, and struck Bradford with the right front portion of the vehicle. Sirk estimated the vehicle's speed at about 15 miles per hour when it hit Bradford, and Sirk stated he intended to hit him in order to slow him down and stop him. He did not intend to run over Bradford.

Sirk testified that he could not rely on the perimeter initially set up by the police to contain the kidnapping suspects because it had been "blown" by the removal of the helicopter and other vehicles, and because he did not observe any other units moving in when he attempted to detain Bradford.

Communications between units were garbled by overriding dispatches from the helicopter which had moved to a different location, and Sirk believed that the other units were not aware that the ransom had been picked up. The decision to use the vehicle to strike Bradford was based in part on Sirk's perception that Bradford could escape through neighboring yards into the backyards and alleyways of residences and that there might be no way to find him once he reached such a location.

When he was hit by the car, the impact bounced Bradford up on the hood of Sirk's vehicle. The vehicle decelerated and almost stopped as a result of the braking maneuver, and Bradford slid off the car and resumed running. He had run only a couple of steps when Sirk accelerated and cut in front of him, taking the vehicle up onto the curb to cut Bradford off. Sirk was unsure whether the vehicle collided with Bradford or whether Bradford ran into the vehicle. Sirk did not know how Bradford's leg got under the vehicle's wheel but did not question that the vehicle ran over his leg. Sirk denied intentionally driving his vehicle over Bradford's leg. The entire incident, from the time Sirk saw Bradford, hit him the first time and then stopped him the second time took approximately three seconds.

Bradford's testimony at trial differed somewhat from Sirk's but was ultimately stricken after the trial court ruled that Bradford's invocation of the Fifth Amendment on cross-examination (to avoid a perjury prosecution based on lies told at his deposition) was not made in good faith. Bradford's ankle was broken as a result of the impact of the vehicle. He experienced considerable pain and testified that he was not able to do any work since the injury. An orthopedic surgeon testified that, although Bradford could probably not run with a normal gait, he could walk without a cane if he wished to do so.

Respondent's expert on police procedures testified that an officer's belief that a threat of death or possible serious injury to another existed was not sufficient to justify the use of deadly force, and that an officer had to conclude that no other alternative exists before using deadly force. The witness opined, based on experiments conducted at the scene, that the incident could not have occurred as Sirk reported because the distances reported were not great enough when taken together with the speeds and actions reported. The witness admitted that the physical location of the incident had changed from the time of the incident to the time of his measurements and experiments. The witness

also opined that the use of the police vehicle to strike Bradford constituted deadly force, and that this force exceeded the amount of force Sirk was permitted to use.

Petitioners' expert on police procedures testified that the use of deadly force was appropriate in these circumstances, given the seriousness of the felony involved, the very real threats to the safety of the victims, and Bradford's flight from the scene of the ransom pick-up in spite of orders from two officers to stop. He also testified that, under the circumstances, the use of the vehicle to strike plaintiff was an appropriate tactic, if somewhat unconventional.

An accident reconstructionist who testified for respondent described how, in his expert opinion, the accident probably occurred: Bradford was hit by the car from behind, went up on the hood, was carried briefly on the car, the car jumped the curb, Bradford came off the front of the car and hit the ground and the car moved forward, the right front tire going over Bradford's leg above the ankle.

Both at the close of plaintiff's case and again at the close of all the evidence, petitioners moved the court for a directed verdict pursuant to ***Rule 50, Federal Rules of Civil Procedure***. Petitioners argued

that the ***Rule 50*** motion should be granted because the evidence was insufficient to support a verdict in Bradford's favor. The motions were denied.

Trial continued until August 15, 1991 when the jury returned a special verdict in favor of respondent. Judgment was entered on the special verdict on August 26, 1991 and amended August 28, 1991. The verdict awarded respondent compensatory damages in the amount of $850,000, and punitive damages in the amount of $40,000 against petitioner Sirk.

Petitioners filed a motion for new trial and a motion to alter and amend the judgment on September 10, 1991. The order denying petitioners' motions was filed November 7, 1991 and entered November 18, 1991. The parties stipulated to dismiss the remaining claims and defendants by order entered on August 11, 1992.

Petitioners appealed the judgment to the United States Court of Appeals for the Ninth Circuit on September 10, 1992. After briefing and oral argument, the court's Memorandum opinion affirmed the trial court's decision denying the ***Rule 50*** motion. Petitioners had conceded that the use of the vehicle to stop Bradford's flight constituted a use of deadly force but argued that it was justified under these

circumstances. The court determined that it was undisputed that Sirk had probable cause to believe Bradford was committing a crime involving the threatened infliction of serious bodily harm, and that the only question presented by the case was whether the amount of force used by Sirk was necessary to prevent Bradford's escape. (Memorandum opinion at Appendix, p. A-8.)

> "More particularly, we must determine whether there was substantial evidence to support a finding that a reasonable officer in Detective Sirk's position would <u>not</u> have found it necessary to use his car as he did to prevent Mr. Bradford from escaping." (Appendix, p. A-8.)

The court concluded that the record contained substantial evidence to support a jury's finding that the officer's use of force was not reasonable.

> "Specifically, the jury could conclude that Detective Sirk's use of a car as a weapon was unnecessary because Sirk had more reasonable alternatives. (¶) Detective Sirk admitted that he deliberately drove his car into Bradford's body to stop Bradford's progress. Mr. Bradford presented evidence at trial that this action was unnecessary

> because Sirk could have relied on the other police who were stationed around the perimeter of the drop site, and because he could have stopped Bradford's forward progress by driving past him rather than into him." (Appendix, A-9.)

The court rejected petitioners' argument that the availability of alternatives was irrelevant to a determination of constitutional reasonableness.

> "Where as here, the plaintiff presents substantial evidence that less intrusive means were available, it is up to the jury to determine if those means were reasonable. (¶) Detective Sirk admitted that he knew that all of the likely avenues of escape were sealed off by other officers, and that it was to be expected that the kidnap suspects would try to flee once they were confronted by the authorities. He knew that Mr. Bradford was traveling on foot, and could have observed that his hands were empty. By driving up ahead of Mr. Bradford, Detective Sirk could have narrowed the already minimal avenues of escape. A reasonable jury could conclude from this evidence that Detective Sirk's unorthodox

actions were objectively unnecessary to prevent Bradford from escaping." (Appendix, A-9.)

The judgment was accordingly affirmed.

ARGUMENT

I.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A petition for writ of certiorari will be granted when there are special and important reasons therefor. (***Rule 10, Rules of the U.S. Supreme Court.)*** A grant of certiorari is justified in the instant case because the Ninth Circuit has rendered a decision in conflict with decisions of other United States court of appeals on the same matter, and has also decided an important question of federal law which has not been, but which should be, settled by this Court.

Since this Court's decision in ***Tennessee v. Garner,*** 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the exact meaning of the rule in that case has remained elusive:

> "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." (*Id.* at 471 U.S. 11, 105 S.Ct. 1701.)

Some circuits have examined the constitutional reasonableness of a police officer's use of deadly force to stop a fleeing felony suspect without reference to the question of whether the use of such force was necessary. Other courts have found certain police use of deadly force reasonable in self-defense, but have gone on to discuss whether the use of such force was necessary. In the Ninth Circuit, published authority states that police officers are not required to choose the least intrusive alternative to the use of deadly force in the heat of battle and must only act reasonably, and yet the ruling in the case at bar has apparently ignored such authority in reliance on its interpretation of ***Tennessee v. Garner*** that deadly force is not reasonable if other alternatives exist which render the use of such force unnecessary.

The state of the law in this area can thus most charitably be described as in flux. In the ten years since ***Tennessee v. Garner*** was decided, the volume and ferocity of criminal conduct with which police officers must contend has increased substantially. Advising police departments on how to avoid conduct which violates the constitutional rights of suspects is increasingly difficult when the rules are obscure, the courts can not agree, and no uniform response can be anticipated in the context of particular circumstances.

A grant of certiorari in the instant case is justified, therefore, to clarify the Court's rule in ***Tennessee v. Garner*** and to resolve the conflicts which have developed in the circuits trying to interpret the rule. Even if this Court determines that the existence of non-deadly alternatives vitiates the constitutional reasonableness of the use of deadly force, some direction should be given to the lower courts with regard to the burden of proving the existence of such alternatives. A plaintiff should not be able to make a case for violation of constitutional rights on evidence that is speculative and theoretical at best, and insubstantial and unsupported at worst.

II.

CERTIORARI IS WARRANTED TO RESOLVE CONFLICTS THAT HAVE DEVELOPED IN THE CIRCUITS REGARDING THE HOLDING THAT DEADLY FORCE IS PERMISSIBLE IF NECESSARY TO PREVENT ESCAPE.

Cases applying the rule of ***Tennessee v. Garner,*** that deadly force is not constitutionally unreasonable if necessary to prevent escape, have not reached agreement on what "necessary" means in the context of constitutional analysis. The Memorandum Opinion in this case indicates a willingness to interpret ***Garner*** to require police officers to consider and eliminate all less injurious alternatives before engaging in a particular course of conduct when the use of deadly force is otherwise appropriate. The creation of such a standard, however, would permit a dangerous commingling of negligence concepts (a *subjective* analysis) with the Fourth Amendment requirement of *objective* reasonableness. Under such a standard, any plaintiff who can afford to pay an expert can avoid summary judgment or a motion for directed verdict simply by introducing evidence that other alternatives to the injurious conduct utilized by the officer existed. The uniform

application of constitutional standards should not rest on so malleable an evidentiary basis.

The generally accepted rule is that the reasonableness of any Fourth Amendment intrusion does not turn on the existence of alternative "less intrusive" means. ***Illinois v. Lafayette,*** 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983). In the Ninth Circuit, however, there is some dispute with regard to the question of whether the constitutional reasonableness of a use of force turns on the existence of alternatives and how the "necessity" requirement of ***Garner*** is to be applied.

In ***Scott v. Henrich,*** 994 F.2d 1338 (9th Cir. 1992), for example, the Ninth Circuit held that the Fourth Amendment requires that official conduct be objectively reasonable, not that all possible alternatives be exhausted before injurious conduct may be utilized.

> "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least*

> intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment. (¶) Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." ***Scott v. Henrich, supra at*** 994 F.2d 1341-1342. (Italics in original.)

The court in ***Scott*** upheld a defense motion for summary judgment, deciding the question of constitutional reasonableness as one of law (***Id.*** at 1341) in spite of plaintiff's argument that the officers should have used alternative, less intrusive measures, in confronting a dangerous suspect. ***Id.*** at 1342.

The case at bar is in sharp conflict with ***Scott*** and also with dicta in ***Brower v. County of Inyo,*** 884

F.2d 1316, 1318 (9th Cir. 1989) which suggests that the existence of a reasonable non-deadly alternative would render the injurious alternative chosen constitutionally unreasonable. Law enforcement agencies within the purview of the Ninth Circuit thus have little guidance upon which to rely in making decisions concerning the use of deadly force to prevent escapes. While one case states that only the actual conduct of the officer will be examined to determine if it is reasonable when it is alleged that such conduct constituted excessive force, other cases allow the imposition of liability on the basis of evidence of alternatives to the officer's conduct proffered by a witness paid by the plaintiff to suggest options which the officer could have utilized. The conflict within the Ninth Circuit itself is thus serious enough to justify a grant of certiorari to resolve.

In addition, this case is also in conflict with the opinions of a number of other circuits. In ***Smith v. Freland,*** 954 F.2d 343 (6th Cir. 1992), for example, the question of whether the existence of non-deadly alternatives vitiated the reasonableness of a police officer's use of deadly force was considered and rejected. The plaintiff in ***Smith*** argued that the use of deadly force was not necessary because non-

deadly alternatives existed, specifically a roadblock and other officers waiting at the end of the road down which the suspect was fleeing. ***Id.*** at 346. The court declined to engage in an evaluation of the officer's decision, however, and instead focused on whether the officer's use of deadly force to prevent escape was unreasonable. ***Id.*** at 347. The court ruled that no rational jury could have determined that the officer acted unreasonably. ***Ibid.***

> "We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." ***Ibid.***

The existence of alternatives to the officer's use of force was not regarded as dispositive, then, since there was no guarantee that a decision not to use deadly force in reliance on the alternatives would have avoided the suspect's escape or further injury to others. ***Ibid.***

In ***Cole v. Bone,*** 993 F.2d 1328 (8th Cir. 1993), a number of law enforcement officers engaged in various tactics trying to stop a speeding truck which

had attempted to ram police cars and force others off the road. *Id.* at 1330-1331. A police officer ultimately decided to use deadly force to stop the driver of the truck because of the demonstrated lack of concern for the safety of others on the highway, and fired into the cab, killing the driver. *Id.* at 1331. The court found that the officer's use of deadly force was constitutionally reasonable under ***Tennessee v. Garner,*** then turned to the issue of necessity.

> "It could be argued, of course, that Trooper Rice's decision to use deadly force might not have been the most prudent course of action; other courses of action, such as another stationary roadblock, might conceivably have been available. The Constitution, however, requires only that the seizure be objectively reasonable, not that the officer pursue the most prudent course of conduct as judged by 20/20 hindsight vision. (Citation omitted.)" *Id.* at 993 F.2d 1334.

The Eight Circuit thus recognizes the close connection between negligence principles ("the most prudent course of conduct") and the argument that the existence of less injurious alternatives renders an officer's choice of deadly force constitutionally unreasonable and declined to engage in the type of

second-guessing such an analysis requires.

Although other circuit court opinions are not directly in conflict with the Memorandum Opinion in this case, they reflect confusion and uncertainty with regard to the application of the court's holding in ***Tennessee v. Garner***. In ***Krueger v. Fuhr,*** 991 F.2d 435 (8th Cir. 1993), for example, the court addressed what it termed the "second prong of the ***Garner*** test," whether the use of deadly force was necessary, in the context of an officer's need to use deadly force to defend himself against attack. ***Id.*** at 991 F.2d 440. The court noted that other officers were in the general area and it was possible, although not certain, that the suspect might have been apprehended by these officers if he had eluded the defendant officer's foot pursuit. ***Ibid.*** However, the court then noted,

> ". . .the Fourth Amendment does not require police officers to forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect. (Citations omitted.)... Thus, we conclude that [the defendant officer's] use of deadly force was necessary to prevent escape in accordance with the standards

enunciated in Garner." *Id.* at 991 F.2d 440. The court apparently read the "if necessary to prevent escape" language of ***Tennessee v. Garner*** to modify not only the language permitting the use of force where a suspect is believed to have committed a crime involving infliction of harm to another, but also to modify the language permitting a police officer to use deadly force when the officer is threatened with a weapon. This conclusion is not logical and serves only to "muddy the waters" for observers trying to achieve some understanding of the rule.

In ***Ford v. Childers,*** 855 F.2d 1271 (7th Cir. 1988), the court upheld the trial court's granting of a ***Rule 50*** motion on the ground that an officer's use of force was objectively reasonable under the circumstances. *Id.* at 1275-1276. The court noted that the objective reasonableness standard required that the defendant's liability be determined "'...exclusively upon an examination and weighing of the information [he] possessed immediately prior to and at the very moment he fired the fatal shot.' (Citation omitted.)" *Id.* at 855 F.2d 1275. The case does not even address the question of whether or not the officer's use of deadly force was necessary to prevent escape.

Similarly, in ***Reese v. Anderson,*** 926 F.2d 494 (5th Cir. 1991), the court found an officer's use of deadly force objectively reasonable since it was based on a reasonable belief that the suspect the officer had just detained was reaching for a weapon and posed a threat to the officer. ***Id.*** at 500-501. The court's analysis includes no discussion of the "necessity" requirement of ***Garner,*** although it did consider and reject as not dispositive the fact that the suspect's vehicle was "totally surrounded" by police, a fact which might have created the inference that the use of force was unnecessary. ***Id.*** at 501.

A discussion of "necessity" is similarly lacking in ***Faire v. City of Arlington***, 957 F.2d 1268 (5th Cir. 1992), where the court decided the case on qualified immunity but noted in dicta that the officer could have used deadly force to prevent a suspect's escape given the suspect's conduct leading up to the shooting: drinking while driving, erratic driving, driving at high speed through a residential neighborhood, and twice crashing the car. ***Id.*** at 957 F.2d 1276. The mere fact that the officer had observed criminal conduct that endangered others, in other words, was apparently sufficient to justify a use of deadly force to apprehend the suspect, and the officer was not required to demonstrate that the

force used was justified because necessary to prevent escape.

Indeed, petitioners could find few cases which address the ***Garner*** requirement that deadly force be necessary to prevent escape in order to be justifiable. ***Ryder v. City of Topeka,*** 814 F.2d 1412 (10th Cir. 1987), involved the shooting of a fleeing suspect. Although the court concluded that the crime involved was not inherently violent, the information available to the officer was sufficient to support his belief that the suspect was possibly armed and dangerous and posed a danger to himself (the officer) or to others. ***Id.*** at 814 F.2d 1420-1423. Turning to the question of whether the use of deadly force was necessary to prevent escape, the court relied heavily on the thought processes of the officer involved and virtually dismissed the plaintiff's contention that alternative methods to the use of deadly force were available for apprehending her. ***Id.*** at 814 F.2d 1423.

This Court's decision in ***Tennessee v. Garner*** has been examined and interpreted by many courts since it was decided in 1985, but no clear consensus has developed concerning how the rule is to be applied in particular circumstances. A number of questions appear to be presented by the cases:

1. Does the "necessity" clause apply if a police officer is using deadly force in self defense?

2. Does the "necessity" clause apply if a police officer is using deadly force in defense of others, either specific individuals or the public in general?

3. Does "necessary to prevent escape" mean that deadly force may be used only when no other alternatives to prevent escape exist?

Certiorari is appropriate in this case to resolve these issues. It is time for this Court to reexamine ***Garner*** in light of the many confusing interpretations of the opinion which have been rendered and to address the conflicts which have developed among the various circuits and, most particularly, within the Ninth Circuit itself.

III.

CERTIORARI IS APPROPRIATE TO CLARIFY THE BURDEN OF PROOF OF ALTERNATIVES TO THE USE OF DEADLY FORCE.

Even if this Court determines that the Ninth Circuit ruled correctly in this matter, and that the existence of non-injurious alternatives renders the use of deadly force constitutionally unreasonable, certiorari is still appropriate to clarify the burden and

level of proof of the existence of such alternatives. In this case, the court found the use of deadly force constitutionally unreasonable because of the existence of alternatives (i.e., relying on the perimeter officers to apprehend the suspect and using the car to cut off the suspect's path of escape) which had been specifically rejected by the officer involved. Some direction is necessary concerning when a police officer's evaluation of the efficacy of alternatives will be subject to second-guessing by experts paid by a plaintiff to evaluate his conduct after the fact.

Respondent in this matter bore the burden of proving that the conduct complained of was constitutionally unreasonable.

> "The general rule is that the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim. (Citations omitted.) Another way of stating this rule is that the party who would lose if no evidence were presented has the burden. (Citations omitted.)" ***Auburndale State Bank v. Dairy Farm Leasing Corp.,*** 890 F.2d 888, 893 (7th Cir. 1989).

While that burden remained constant throughout the trial, it is probable that the burden of producing

evidence shifted to petitioners on some occasions, particularly with regard to producing evidence in support of its contention that the use of deadly force was justified. See, e.g. ***Simpson v. Home Petroleum Corp.,*** 770 F.2d 499, 501-503 (5th Cir. 1985).

Petitioners arguably met that burden, however, by proving that respondent had committed a crime involving the infliction or threatened infliction of serious physical harm (a fact with which the court agreed), and by producing substantial evidence that the use of deadly force was necessary because no reasonable alternatives were available. Detective Sirk testified that he did not believe he could rely on the perimeter officers to apprehend Bradford because the perimeter had been breached by the departure of the air unit and several vehicles which followed the other car that cruised slowly through the stake out area but left without picking up the ransom. Sirk also testified that he believed the other officers involved in the operation had not heard the radio alert that Bradford had picked up the ransom because the helicopter unit was interfering with communications and he could observe no other units responding as he drove his vehicle in pursuit of Bradford.

In opposition to this evidence, respondent's

expert testified that Sirk's use of deadly force was inappropriate because alternatives existed; specifically, Sirk could have driven past Bradford and established a perimeter at the corner. The mere possibility that Bradford might have escaped was insufficient, in respondent's expert's opinion, to justify the use of deadly force because the officer was not in any personal danger. Since the reports of the incident contained no mention that the perimeter had broken down, Sirk was not justified in believing that the departure of the air unit and other vehicles somehow compromised the perimeter.

Certiorari is needed to clarify the burden of proving the existence and viability of alternatives to the use of deadly force. If a plaintiff produces expert opinion evidence that the use of deadly force was inappropriate because alternatives existed, may a jury rely on such testimony and rule that a police officer's use of force was constitutionally unreasonable even where the officer produces contradictory evidence that the alternatives were considered and rejected as infeasible? Should the question of constitutional reasonableness (and whether plaintiff has proved a cause of action pursuant to ***42 U.S.C. § 1983***) turn on the existence of subjective alternatives (i.e., the officer could have

done this, or should have done that) as opposed to real alternatives any objectively reasonable observer would credit? These and other questions should be resolved by this Court, and not left to the individual circuits to resolve in a piecemeal manner.

IV.
CONCLUSION

For the foregoing reasons it is respectfully requested that this Court grant a writ of certiorari and set aside the decision of the United States Court of Appeals for the Ninth Circuit.

DATED: June 8, 1994

Respectfully submitted,

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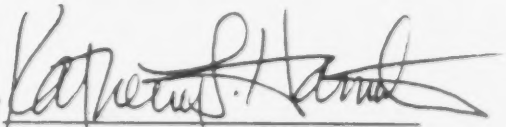
By 
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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRADFORD V. CITY OF LOS ANGELES, et al.

(92-56173; 93-55051)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY BRADFORD, Plaintiff-Appellee, v. CITY OF LOS ANGELES; MICHAEL SIRK, Defendants-Appellants.	No. 92-56173, 93-55051 D.C.No.CV 90-0128 RSWL MEMORANDUM*

Appeal from the United States District Court
for the Central District of California,
Los Angeles
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted March 10, 1993
Pasadena, California

Before: Pregerson, O'Scannlain, and Fernandez, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I. INTRODUCTION

Los Angeles Police Department ("LAPD") Detective Michael Sirk, appeals the jury's verdict in favor of Henry Bradford in his action under 42 U.S.C. § 1983. Detective Sirk also appeals the district court's award of $88,518.36 in fees and costs under 42 U.S.C. § 1988. Detective Sirk contends: (1) there was insufficient evidence to support the verdict, (2) the trial court should not have permitted Mr. Bradford to assert the Fifth Amendment and avoid cross-examination, (3) the jury improperly considered Mr. Bradford's testimony despite the court's admonishment, (4) the damages award of $850,000.00 was excessive, (5) there was insufficient evidence to support the award of $40,000 in punitive damages, and (6) the attorney's fee award was excessive. Finding no merit in any of these claims, we affirm.

II. BACKGROUND

On March 14, 1989, appellant, Michael Sirk, a Detective with the Los Angeles Police Department ("LAPD"), took part in a police operation designed to foil a kidnap and ransom attempt. As part of the operation, the police worked with the victim's family to arrange a fake ransom drop at an intersection in

South Central Los Angeles. Detective Sirk was one of the officers assigned to stake out the drop spot to cut off any attempted escape by those who picked up the ransom packages.

One of the officers, the "point officer," saw the respondent, Henry Bradford, drive with some other people to the ransom spot. Mr. Bradford left the car and ran to pick up one of the two ransom packages. The point officer radioed this information to the others. As Mr. Bradford made his way back to the car, the point officer walked out of his hiding place and ordered Mr. Bradford to freeze. Mr. Bradford continued running, threw the ransom package into the car, and began to run down the street away from the car and away from the point officer.

When Detective Sirk heard the point officer's broadcast he was in his unmarked police car with the engine running, about 40 feet away and around the corner from the point officer. He turned the corner onto the street where Bradford was running and pulled up behind him. Detective Sirk's partner pulled his gun on Bradford, and yelled for him to halt. When he failed to do so, Detective Sirk deliberately drove the police car into Bradford. The car hit him from behind, knocking him up onto the hood and

rolling him onto the ground when the car stopped.[1]

The parties dispute what happened next. In Detective Sirk's version of events, Bradford got back on his feet and again attempted to run away. Then Detective Sirk, who had stopped the car after hitting Bradford, pulled onto the curb in an attempt to cut in front of him. Instead, he hit Bradford a second time, denting the car and knocking him to the ground. Detective Sirk testified, "I believe he struck the car more than the car struck him." Somehow, in the second impact, Bradford was thrown backward and his right ankle fell under the right car wheel.

By contrast, in Mr. Bradford's version, he never returned to his feet after falling off the police car. Rather, he landed with his left leg tucked under his body and his right leg extended flat against the ground, and was trying to push himself up with his hands when Sirk needlessly aimed the police car in his direction and ran over his right ankle.

By either account, the car caused a severely comminuted fracture of the distal tibia and fibula, that is, it fractured and fragmented his right shin

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[1] As this was happening, the car in which Bradford had arrived started up and drove the wrong way down a one-way street. One of the officers shot and killed the driver of the car. These events are not at issue in this case.

bone and the small bone just above his right ankle. In addition to the immediate pain caused by the injury, Mr. Bradford was forced to undergo surgery, and has never regained full use of his leg. Although he can now walk, perhaps without the aid of a cane, he cannot run, and continues to experience swelling and pain from continuous activity.

After hitting Bradford with his car the second time, Detective Sirk left the car, and he and two other officers arrested Bradford. A civilian eyewitness thought that the officers handled Mr. Bradford roughly, and heard one of the officers, possibly Sirk, say to Bradford, "Hey, nigger, where is the lady and the kid . . . ." 7/24/91 RT at 10.

Bradford testified on the third day of trial. On direct examination he testified that he had just left the car and was walking when he was hit by the police car. The car knocked him down, and then drove over his ankle. After that, he could not move his leg so he slid over to get out of the way of the car, which was once again moving in his direction, and which did not stop until he was pinned to the fence. The police got out of the car and one of them held a gun to his temple and insulted him while another one sat on him and punched him until he blacked out. Bradford also testified about his

treatment once taken into police custody, about the nature and extent of his injuries, and about his work history.

Mr. Bradford was cross-examined about all of the above, including his version of the sequence of events leading up to his injury. But he invoked the Fifth Amendment and refused to answer any questions about the ransom box or about what he said to the other occupants of the car. On Detective Sirk's motion, the trial judge instructed the jury to disregard all of Mr. Bradford's testimony other than that regarding the injuries he received or the consequences of those injuries. The district court denied Detective Sirk's motions for a directed verdict, and after the jury returned its verdict the court denied Sirk' motion for a new trial.

III. DISCUSSION

A. Liability.

Detective Sirk contends that it was error for the trial judge to deny his Rule 50 motion for a directed verdict because Bradford presented insufficient evidence for a jury to find Sirk liable. We use the same standards as the district court to determine if a directed verdict was appropriate. The Jeanery v. James Jeans, 849 F.2d 1148, 1151 (9th Cir. 1988). We therefore review the evidence,

considered in the light most favorable to the non-moving party, to determine if there was substantial evidence to support a jury verdict in favor of that party. George v. City of Long Beach, 973 F.2d 706, 710 (9th Cir. 1992), cert denied, 113 S.Ct. 1269 (1993).

Here we must determine if there was substantial evidence to support a determination that Detective Sirk used unreasonable force to make the arrest. See Graham v. Connor, 490 U.S. 386, 395 (1986) (all claims that law officers used excessive force in the course of arrest should be analyzed under the Fourth Amendment reasonableness standard). In this inquiry, we judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene. Id. at 396. The use of deadly force by an officer is reasonable only if (1) the suspect threatens the officer with a weapon, or there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, and (2) the deadly force is necessary to prevent escape. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

Detective Sirk concedes that there was substantial evidence that he used deadly force

against Mr. Bradford. See U.S. v. Sanchez, 914 F.2d 1355, 1363 (9th Cir. 1990) (use of a vehicle to run over a person may constitute deadly force), cert. denied, 499 U.S. 978 (1991). It is also undisputed that Detective Sirk had probable cause to believe that Bradford was committing a crime involving the threatened infliction of serious bodily harm. Therefore, the only question for the jury was whether the amount of force used by Sirk was necessary to prevent Bradford's escape. More particularly, we must determine whether there was substantial evidence to support a finding that a reasonable officer in Detective Sirk's position would not have found it necessary to use his car as he did to prevent Mr. Bradford from escaping.

We conclude that there was substantial evidence to support such a finding, viewing the evidence in the light most favorable to Bradford. Specifically, the jury could conclude that Detective Sirk's use of a car as a weapon was unnecessary because Sirk had more reasonable alternatives.

Detective Sirk argues that this availability of alternative measures "is irrelevant" because the correct inquiry is whether the officers acted reasonably. Blue Brief at 28 (citing Scott v. Henrich, 978 F.2d 481, 484 (9th Cir. 1992), withdrawn 994

F.2d 1343 (9th Cir. 1992)). This misstates the law. The availability of less adventurous alternatives is obviously relevant to the factfinder's ultimate determination of the reasonableness of the officer's actions. See Garner at 11 (deadly force is only reasonable if necessary to present escape). Where as here, the plaintiff presents substantial evidence that less intrusive means were available, it is up to the jury to determine if those means were reasonable.

Detective Sirk admitted that he knew that all of the likely avenues of escape were sealed off by other officers, and that it was to be expected that the kidnap suspects would try to flee once they were confronted by the authorities. He knew that Mr. Bradford was traveling on foot, and could have observed that his hands were empty. By driving up ahead of Mr. Bradford, Detective Sirk could have narrowed the already minimal avenues of escape. A reasonable jury could conclude from this evidence that Detective Sirk's unorthodox actions were objectively unnecessary to prevent Bradford from escaping.

B. Fifth Amendment.

Detective Sirk contends that the district court erred in denying its motion for a new trial because

Mr. Bradford was improperly allowed to invoke his Fifth Amendment privilege against self-incrimination during cross-examination. We review the district court's denial of a new trial for abuse of discretion. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989).

The parties dispute whether Mr. Bradford was entitled to invoke the Fifth Amendment, whether the district court's instruction to disregard his testimony was adequate to prevent any prejudice, and whether Detective Sirk waived any right to a new trial by waiting until after the jury's verdict to object to the district court's remedy. We need not address the first two issues because we agree with the district court that Detective Sirk waived his right to a new trial by assenting to the district court's remedy until after the verdict was in.

Rule 46 of the Federal Rules of Civil Procedure ("FRCP") requires any objection, or any proposal for action by the court, to be made "at the time the ruling or order of the court is made or sought."[2] It follows that, "in a civil action, '[a] principle that

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[2] There is an exception if the party has no opportunity to object when the decision is made. Detective Sirk does not suggest that he had no opportunity to object to the court's ruling.

strikes very deep is that a new trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result.'" United States v. Walton, 909 F.2d 915, 924 (6th Cir. 1990) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2805, at 39 (1973)). See also Nisshow-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 618 (5th Cir. 1988) (reversing district court's grant of a new trial because issue was not raised during the trial).

(1) Failure to object during trial:

During the trial Detective Sirk objected to the district court's decision to allow Mr. Bradford to invoke during cross-examination his fifth amendment right against self-incrimination. Sirk asserted that Mr. Bradford had waived his Fifth Amendment right against self-incrimination by voluntarily taking the witness stand. To remedy this situation, Sirk's counsel moved to strike the remainder of Bradford's testimony, and he moved for a directed verdict on the ground that Bradford had no case in the absence of his own testimony.

The court properly denied the motion for a directed verdict, as discussed supra, but it granted Sirk's motion to strike Bradford's testimony, except

as it related to damages. Detective Sirk did not object to this remedy, which he had suggested, nor did he move for a mistrial, either at that time or at any time before the verdict. "If the defendants believed that the testimony of plaintiff's expert would undermine the prophylactic effect of the Court's instructions to the jury to disregard Bradford's testimony, defendants should have moved for a mistrial then, not [after the verdict]." Order re: Defendants' Motion for a New Trial, at 7. According to Detective Sirk, he did not do so because he "failed to appreciate that [this remedy] . . . would prove insufficient to cure the error." Blue brief at 38. Presumably he was not convinced of this until he discovered he had lost the case. This is exactly the kind of sand-bagging that the rule requiring timely objections is designed to cure.

(2) Gross injustice:

No gross injustice resulted from the district court's decision to allow Mr. Bradford to invoke the Fifth Amendment and to instruct the jury to disregard his testimony. Mr. Bradford was willing to, and did, face cross-examination about his version of the collision. In fact, he answered questions and withstood cross-examination on all aspects the events surrounding his injury except whether he

went to pick up the ransom box and what he said to the other occupants of the car that he drove to the drop site.

Even on these issues, Detective Sirk suffered little, if any, prejudice from Bradford's silence. Detective Sirk was free to impeach Bradford's credibility on any issue. He was free to read his contrary deposition testimony into the record and to call the jury's attention to Mr. Bradford's refusals to answer questions. Moreover, Bradford's counsel conceded to the jury that it could "assume . . .[that] he ran across the street, grabbed the package, ran back, threw it in the passenger side and started running down the street or actually probably on the sidewalk." 8/12/01 ER at 20. Finally, the court instructed the jury that Detective Sirk had probable cause to detain Mr. Bradford for a possible kidnapping violation.

Because Detective Sirk did not timely object to the district court's remedy, and because no gross injustice resulted, the district court did not abuse its discretion in denying the motion for a new trial based on the Fifth Amendment testimony.

C. Jury misconduct.

Detective Sirk also claims that the district court erred in denying his motion for a new trial

based on jury misconduct. We review the decision not to grant a new trial based on juror misconduct for abuse of discretion. Hard v. Burlington Northern Railroad, 870 F.2d 1454, 1461-62 (9th Cir. 1989) ("Hard II"). To support his motion, Detective Sirk submitted affidavits from several of the jurors alleging: (1) that the jury considered Mr. Bradford's stricken testimony despite the judge's instruction not to; (2) that the jurors speculated about the reason Bradford invoked the Fifth Amendment; (3) that they made use of the scientific knowledge of some of the jurors; and (4) that they adjusted the damages award to take into account their own estimate of the proportion of the award that would go for attorney's fees. We agree with the district court's well reasoned decision not to consider these affidavits in determining the merits of Detective Sirk's motion.

Rule 606(b) of the Federal Rules of Evidence ("FRE") provides that a juror may not testify or provide an affidavit for the court's consideration

as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions . . . except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or

whether any outside influence was improperly brought to bear upon any juror.
FRE 606(b) (emphasis added).

Sirk contends that the jury's speculation about attorney's fees and its consideration of Bradford's stricken testimony are "extraneous prejudicial information" that may be admitted to show jury misconduct under the exception in Rule 606(b). We have recently held that speculation about attorney's fees is not the sort of information that falls within this exception. Morgan v. Woessner, 997 F.2d 1244, 1261 (9th cir. 1993), cert. dismissed, 114 S.Ct. 671 (1994).[3] As to the jury's alleged consideration of stricken testimony, Detective Sirk cites no case, nor could he, that has found such consideration to constitute "extraneous" information.

We have held that Rule 606(b) makes testimony about the existence of any extraneous prejudicial information admissible to prove juror

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[3] Hard v. Burlington Northern Railroad, 812 F.2d 482, 485-6 (9th Cir. 1987) ("Hard I"), cited by Detective Sirk, is not on point. There we held that juror discussion of past experiences that were "directly related to the litigation" could constitute extraneous prejudicial information which would be admissible to prove juror misconduct. Hard II, at 1162. We therefore remanded to the district court to hold an evidentiary hearing to determine if the juror discussed his past experience with the defendant's treatment of job injuries with the jury.

misconduct. Hard, 870 F.2d at 1461. But testimony about how such information affected the deliberative process is not admissible. Id. Whenever a judge instructs a jury to disregard testimony, the existence of that testimony is self-evident, since all of the jurors will have been present when the testimony was given. Therefore, the only use that affidavits could serve would be to demonstrate that this information affected the deliberative process. This is precisely what is protected by rule 606(b).

D. The amount of compensatory damages.

Detective Sirk claims he should have been granted a new trial on the ground that the compensatory damages award of $850.000 was excessive. "The purpose of awarding damages in a Section 1983 action is to compensate the aggrieved party." Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985). The trial court's obligation was to uphold the jury award unless the amount was clearly unsupported by the evidence and was grossly excessive, monstrous, or shocking to the conscience. Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1501 (9th Cir. 1986).

Here the damages award was supported by

Mr. Bradford's testimony and that of Doctor Shlens[4] Each testified that the injury was severe, and that it continued to have a serious impact on Bradford's mobility. Bradford stated that he could not stand up longer than 20 minutes at a time without experiencing pain and swelling. The injury prevented him from lifting weights and riding his bicycle, activities he previously had engaged in several times a week. He also testified that because of the injury he was precluded from doing the work for which he had prior experience. Bradford was a licensed cosmetologist, and had also worked loading rigs for a metal company, doing maintenance, and doing clerical work.

Detective Sirk contends that the jury improperly included lost earnings in the damage award. First, it is not clear how much, if any, of the award was intended to cover lost earnings. Detective Sirk asserts that lost earnings were included because Mr. Bradford's attorney argued to the jury that it could award lost earnings, and because the jury wrote "includes everything" next to

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[4] The district court did not instruct the jury to disregard Mr. Bradford's testimony about the nature and extent of his injuries, and Detective Sirk has not suggested that this decision was not proper.

the amount of the award on its special verdict form. We are not permitted to speculate on the meaning of these cryptic words. See Tanno v. S.S. President Madison Ves, 830 F.2d 991 (9th Cir. 1987) (Information volunteered by jury in the margin of its special interrogatory form equivalent to the jurors testifying as witnesses about their verdict, and therefore must be excluded under FRE 606(b)). In any case, we find nothing wrong with including some money for lost earnings in the award. The jury was entitled to credit Mr. Bradford's uncontroverted testimony that he lost some work income as a result of the injury.

E. Punitive Damages:

Punitive damages are appropriate in a Section 1983 action "'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" Kennedy v. Los Angeles Police Dept., 901 F.2d 702, 707 (9th Cir. 1989) (quoting Smith v. Wade, 461 U.S. 30, 56 (1971)). The standards for Section 1983 liability "largely overlaps" this standard for punitive damages. Larez v. City of Los Angeles, 946 F.2d 630, 649 (9th Cir. 1991). The difference is that compensatory damages are mandatory once liability

is found, whereas punitive damages are never awarded as of right. Smith, 461 U.S. at 52. Once the jury has determined that the defendant is factually liable, its decision to award punitive damages properly depends on its discretionary moral judgment that the defendant's culpable conduct merits the particular punitive award imposed. See Id. at 648 (discussing the standard set forth in Smith 461 U.S. at 52). The decision to make this judgment and impose punitive sanctions is "within the exclusive province of the jury." Kennedy 901 F.2d at 707. In the case at bar, the same substantial evidence that supports the jury's finding that Detective Sirk violated Mr. Bradford's Fourth Amendment rights also supports the award of punitive damages.[5]

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[5] Detective Sirk cites two of circuit cases in support of his theory that we should review the punitive damages award less deferentially. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 581 (1st Cir. 1989), merely states that punitive damages require more culpable conduct than compensatory damages. This is consistent with our analysis. On the other hand, Wulf v. City of Wichita, 883 F.2d 842, 867 (10th Cir. 1989) seems to require an entirely separate factual inquiry by the jury, which must satisfy a separate sufficiency of the evidence test. See Id. (reversing an award of punitive damages while upholding Section 1983 liability). Such a requirement is inconsistent with our cases, cited in the text, and with Smith v. Wade. See Smith, 461 U.S. at 51-52 (approving punitive damages jury

F. Attorney's fees:

Finally, Detective Sirk claims that the amount of attorney's fee awarded by the district court, under 42 U.S.C. § 1988, was excessive. We review the award of attorney's fees for abuse of discretion. Oviatt v. Pearce, 954 F.2d 1470, 1481 (9th Cir. 1992). Detective Sirk presents a laundry list of hours he claims were unreasonably expended, of which only one is worthy of discussion.

He asserts that the award should be reduced because Mr. Bradford dismissed his case against two of the defendants on the eve of trial. He cites Corder v. Gates, 947 F.2d 374, 379 (9th Cir. 1991), for the proposition that it was improper not to make such a reduction. But in Corder we explicitly made clear that district courts have "considerable discretion" whether to reduce an award where, as here, the plaintiff brings suit against a number of defendants but only prevails against a few. Id. at 380. We find no abuse of discretion in this or any of the other decisions that went into the attorney's fee award.

AFFIRMED.

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instruction that applied substantially the same standard as applied to compensatory damages).